WATHEN *v.* JACKSON OIL & REFINING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 79. Submitted November 9, 1914.—Decided January 11, 1915.

The right to restrain the enforcement of a statute as an unconstitutional deprivation of its property is a right existing in the corporation itself, and a stockholder is not entitled to maintain such an action without clearly showing that he has exhausted the means within his reach to obtain action by the corporation in conformity to his wishes.

Under Equity Rule No. 27 (formerly No. 94) in order to confer jurisdiction upon a Federal court of a suit by a stockholder to enforce a remedy belonging to the corporation the bill must allege not only that the suit is not a collusive one for the purpose of conferring jurisdiction but that unsuccessful efforts have been made to induce the corporation to bring the suit or the reasons for not making such efforts.

A bare assertion, by a stockholder in a suit to enjoin the officers of a corporation from complying with a statute alleged to be unconstitutional, that the officers and directors do not wish to comply with it but intend to for fear of incurring penalties, without stating any ground for dispensing with efforts to procure action by the corporation, is not sufficient under Equity Rule No. 27.

THE facts, which involve the constitutionality of certain provisions of the ten-hour labor law of Mississippi and

court of the United States jurisdiction of a case of which it would not otherwise have cognizance,' but that the bill 'must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the cause of his failure to obtain such action.' The present rule (Rule 27, 226 U. S. Appx., p. 8) adds to this provision the words,—'or the reasons for not making such effort'; and these reasons, of course, must be adequate. The rule embraces those cases where the wrong to the corporation arises from unconstitutional legislation. *Corbus* v. *Alaska Gold Mining Co.*, 187 U. S. 455; *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 220; *Ex parte Young*, 209 U. S. 123, 143. Here, while it is averred that the suit is not a collusive one in order to confer a jurisdiction which would not otherwise exist, there is no allegation that the complainant has made any request that the corporation should bring the suit to prevent the alleged invasion of its rights; nor does it appear that, by reason of antagonistic control of the corporation, such a request would be futile. Although apparently the holder of a majority of its stock, the complainant does not show any effort whatever to induce the corporation to sue. He contents himself with asserting in effect that, though the directors and officers do not wish to comply with the statute, they will do so through fear of its penalties. But this reason is palpably inadequate inasmuch as the corporation itself would be entitled to protection against the imposition of such penalties as would virtually deny access to the courts for the protection of rights guaranteed by the Federal Constitution. *Ex parte Young*, 209 U. S., p. 147; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53, 54; *Missouri Pacific Rwy.* v. *Tucker*, 230 U. S. 340, 351; *Ohio Tax Cases*, 232 U. S. 576, 587; *Wadley Southern Rwy.* v. *Georgia*, decided this day, *post*, p. 651. The allegations of the bill show no

ground for dispensing with efforts to procure action by the corporation; and in this view, without discussing the merits of the case, we are of the opinion that the complainant was not entitled to the injunction sought.

Order affirmed.